SAN JOSE MERCURY (CA)
16 December 1985

# Spies' threats to tell all cr

# prosecuting dilemma

By Dan Nakaso
Mercury News Staff Writer

Tripped up and trapped by federal agents, accused American traitors often find themselves with only one card to play — the threat to tell their secrets.

Many suspected spies use it as a last tactic to dodge prison. In the espionage game, it is called "graymail" — a thinly veiled form of blackmail. And it puts federal prosecutors on the spot, forcing them to decide between prosecuting alleged spies — a high priority for a conservative administration — and exposing vital secrets, which the intelligence community wants kept under wraps.

This year it may be tougher than ever for prosecutors. There have been 13 espionage trials and guilty pleas so far in 1985 — the most ever, according to the Justice Department. Months ago, 1985 earned the reputation as The Year of The Spy.

The last defendant in one of the biggest cases of the year, the alleged Walker-Whitworth spy ring, faces a pretrial hearing in San Francisco today. Jerry Alfred Whitworth, 46, of Davis, a small-town Oklahoma boy who joined the Navy to find adventure, faces life in prison on charges of selling Navy communications materials to the Soviets.

"There are genuine differences between the demands of justice in our country and the demand for secrecy and intelligence," said retired Adm. Stansfield Turner, former CIA director under President Carter.

Turner, now an author and consultant, had to expose secret materials in exchange for prosecuting spies during his tenure as CIA chief.

It's a "balancing act between the demand for secrecy and the democratic process," Turner said in an interview from Narragansett, R.I.

He devoted much of a recent book on the CIA to the push and pull between prosecuting spies and revealing state secrets.

"I's the battle between the CIA and FBI and the Navy," said James Bamford, a best-selling author on national security issues. The intelligence agencies don't want any secrets revealed. But the Navy is "adamant about finding out exactly what was compromised. And the Navy is interested in vengeance. The prosecutor's in the middle, to balance the interests on both sides."

Spy cases have boomed since the Ford administration. From 1966 to 1975, only two people were indicted for espionage, according to the Justice Department. In the decade since, there have been 41 indictments.

## Better techniques

Part of the increase is due to better spy-catching techniques. But there are also more people willing to sell out their country.

"There are more spies and a huge appetite by the Soviets and the Soviet bloc countries for intelligence data and technical hardware," Justice Department spokesman John Russell said.

Currently, the department estimates that more than 4 million Americans have security clearance for classified documents.

A few years ago, defense attorneys using graymail tactics carried a sizable club. In the last few years, though, the weight has shifted, and the threats are not as feared.

## Act offsets threats

In 1980, in direct response to graymail tactics, the government adopted the Classified Information Procedures Act, which singlehandedly has offset graymail threats, government prosecutors said.

CIPA, as it is known, prevents espionage defendants from taking the stand and spewing forth all they know about classified information. Now, defense attorneys must present the information to a judge, in private, before it goes into open court. The judge then rules whether the information is relevant.

"It balances the scales," said Robert Bonner, U.S. attorney in Los Angeles, where spy suspect Richard Miller is on trial. Before, espionage suspects "had an advantage that no other criminal defendant had — to exercise a certain amount of extortion. I don't see any reason in the world while somebody who's committed espionage ought . . . to benefit by sensitive information."

CIPA also bridges the often-stormy relationship between the Justice Department and the intelligence community.

## More trust

"They trust each other more than they used to," said Mark Lynch, an ACLU attorney in Washington who is working on the National Security Project, which specializes in cases dealing with civil liberties and national security. "Now the intelligence community can get involved (in prosecuting spies) without losing its pants."

In 1982, two years after CIPA was adopted, the attorney for a man charged with smuggling arms to Libya reportedly vowed to reveal information that would "shake the CIA to its foundations."

Herald Price Fahringer, representing Edwin P. Wilson, didn't make good on his promise. Fahringer had tried to allege that Wilson was acting as an undercover CIA agent. Partially because of CIPA, Fahringer never was able to submit information about alleged CIA links. His client was convicted.

## Balance maintained

CIPA, however, does not tip the balance toward the prosecution's side, said Philip Heymann, whose Justice Department criminal division wrote the act under Carter.

"The act is written in such a way to not cut off any valid defense," said Heymann, now a Harvard Law School professor. "Before that, every defendant could say, 'Look, my defense requires me to reveal every secret I ever knew.' And the prosecution would have to dismiss the case. The act says, 'What secrets do you need to reveal?' And the judge can rule on that.

Continued